DISTRIBUTED

AUG 9 1984

No. 83-1959

FILED

AUG 9 1984

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

GARY JOHN EKLUND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DEPUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether failure to register with the Selective Service is a continuing offense.

2. Whether petitioner was improperly denied the right to an evidentiary hearing on his claim of selective prosecution.

3. Whether petitioner was impermissibly selected for prosecution for violation of the Military Selective Service Act in retaliation for the exercise of his First Amendment rights.

4. Whether the 30-day notice-and-comment requirement contained in 50 U.S.C. App. 463(b) applies to the Presidential Proclamation directing registration with the Selective Service.

5. Whether one subject to Selective Service regulations has a right to judicial enforcement of the 60-day notice-and-comment period adopted by the Director of Selective Service for issuance of such regulations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Constitution, statute, regulations and rule:

Miscellaneous:

Page

Miscellaneous—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1959

GARY JOHN EKLUND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-87a) is reported at 733 F.2d 1287. The opinion of the district court (Pet. App. 97a-123a) is reported at 551 F. Supp. 964.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 158a-160a) was entered on May 4, 1984. The petition for a writ of certiorari was filed on May 31, 1984. On June 18, 1984, the Court denied petitioner's motion to expedite consideration of the petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1]Pursuant to Sup. Ct. R. 19.4, petitioner and Russell James Martin have filed a consolidated petition for certiorari to review the judgments of the court of appeals in their cases. Because of the significant differences in the procedural posture of petitioners' cases and in the appropriate disposition of their claims by this Court, we are filing a separate response for each petitioner.

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of violating 50 U.S.C. App. (& Supp. V) 453 and 462 by failing to register with the Selective Service as required by Presidential Proclamation No. 4771. He was sentenced to two years' imprisonment. The court of appeals affirmed.

On July 2, 1980, President Carter, acting pursuant to the Military Selective Service Act (50 U.S.C. App. (Supp. V) 453), issued Presidential Proclamation No. 4771, 45 Fed. Reg. 45247 (1980). The Proclamation directed all males residing in the United States and born in 1960 to register with the Selective Service during the week of July 21, 1980, by filling out a registration form at a local post office. Pet. App. 2a-3a. Petitioner, who was born on February 9, 1960 (Tr. 61), did not register that week or at any time thereafter (Tr. 76-77). Instead, on January 3, 1981, he sent a letter to the Selective Service informing it that he had failed to register during the preceding July "as the law require[s]" and that he did not intend to register in the future because of his belief that the government lacked "the right to force unwilling individuals to participate in the military." Observing that no one had yet been prosecuted for noncompliance with the registration law, he volunteered to be the first and requested the government within the next few months "to either begin prosecution or send [him] a letter apologizing for the disruption in [his] life * * *." GX 1.

In June 1981, the Selective Service sent petitioner a letter reminding him of his obligation to register, requesting that he comply by filling out an enclosed registration card, and warning that failure to comply could result in his prosecution (Pet. App. 6a; Tr. 45-51; GX 2). Although Eklund received the letter, he did not register (Tr. 76-77; GX 3).

In July 1981, petitioner's name was transmitted by the Selective Service to the Department of Justice along with the names of 133 other possible nonregistrants who either had written to the government stating their failure to register or had been reported as possible violators by others (see Tr. 44; Pet. App. 81a). On October 5, 1981, after the Department's Criminal Division had referred petitioner's case to the United States Attorney for the Southern District of Iowa, an Assistant United States Attorney in that office wrote petitioner a letter again reminding him of his obligation to register and requesting that he do so by returning an enclosed card. Again, petitioner failed to comply (Tr. 53-56; GX 4-5). On August 24, 1982, an FBI agent visited petitioner at his residence and delivered a third written request, a registration form, and a brochure explaining the registration law (Tr. 59-60; GX 6, 9). Petitioner acknowledged that he was aware of his obligation to register and that he had not done so. At the agent's urging, however, petitioner stated that he would consider registering and agreed to contact the United States Attorney in the event he decided to do so. When he still did not register, a grand jury returned a one-count indictment on August 31, 1982, alleging that "[b]eginning on or about July 27, 1980 and continuing to at least on or about August 30, 1982 * * * [petitioner] did knowingly and willfully fail, evade and refuse to present himself for and submit to registration" in accordance with the Military Selective Service Act, Presidential Proclamation No. 4771, and implementing rules and regulations.

At trial, petitioner testified on his own behalf and reiterated his belief that the registration law infringed upon personal freedoms (Tr. 96). He explained, however, that during the week he was required to register, he did not believe that he had an obligation to do so because he had read in a newspaper that a court had held the registration statute unlawful on the ground that it impermissibly discriminated on the basis of gender (Tr. 92-94).

2. a. Prior to trial, petitioner moved to dismiss the indictment on the ground of selective prosecution. In addition, he sought discovery of government documents in support of that claim and requested an evidentiary hearing on the motion. Petitioner alleged that, although more than 500,000 eligible men had not registered, only eight had been indicted for nonregistration and that each of them was a public opponent of the draft who had written the government informing it of his failure to register. The motion further alleged that "[t]he enforcement system established and utilized by the [government] to prosecute [petitioner] and the selected few other young men indicted for failure to register, purposely focuses only upon those men who have lawfully expressed opposition to the draft, in violation of the First Amendment to the United States Constitution" (Motion to Dismiss Indictment for Selective Prosecution at 1).[2]

To substantiate his allegations, petitioner relied upon statements made in memoranda generated within the Justice Department's Criminal Division that outlined the operation of the "passive enforcement" program developed by the Selective Service for the initial investigation and prosecution of identified nonregistrants.[3] For example, one memorandum explained that the cases that had been referred to the Criminal Division by the Selective Service

---

[2]Petitioner had participated in a public demonstration against draft registration at the post office in Des Moines, Iowa, and stated during the demonstration that he would not register (Pet. App. 108a).

[3]The implementation of the passive enforcement program by the Selective Service and the Department of Justice is described in greater detail in the government's brief (at 5-7) in response to the petition in *Wayte* v. *United States*, cert. granted, No. 83-1292 (May 29, 1984). Copies of the government's brief and supplemental memorandum in *Wayte* and the government's petition for certiorari in *United States* v. *Schmucker*, No. 83-2035, are being sent to counsel for petitioner.

involved nonregistrants who fell into two categories: " '(1) those who wrote to Selective Service and said they refused to register and (2) those whose neighbors and others reported them as persons who refused to register' " (Memorandum in Support of Motion at 5 (footnote omitted), quoting Memorandum from Assistant Attorney General D. Lowell Jensen to the Attorney General (July 14, 1981)). In addition, a Memorandum from the Assistant Attorney General for the Criminal Division to United States Attorneys explained that, because the passive enforcement program provided that nonregistrants would be given the opportunity to register prior to the initiation of prosecution, it " 'is designed to ensure that (1) the refusal to register is willful and (2) only persons who are the most adamant in their refusal to register will be prosecuted.' " For this reason, the Memorandum recognized, " 'the first prosecutions are liable to consist of a large sample of persons who object [to registration] on religious and moral grounds and persons who publicly refuse to register,' " and therefore "the prosecutions of persons falling within the latter category are liable to raise thorny selective prosecution claims" (Memorandum in Support of Motion at 2-3, 6, quoting Memorandum from Assistant Attorney General Jensen to United States Attorneys (July 9, 1982)).

Petitioner also moved to dismiss the indictment on the ground that it improperly charged the failure to register with the Selective Service as a continuing offense "[b]eginning on or about July 27, 1980 and continuing to at least on or about August 30, 1982." Relying on *Toussie* v. *United States*, 397 U.S. 112 (1970), petitioner argued that nonregistration is not a continuing offense and could be committed only during the six-day period prescribed for registration by Presidential Proclamation No. 4771.[4]

---

[4]Petitioner renewed this claim in a pretrial motion in limine on October 21, 1982, and in a motion for a finding of not guilty at the close

b. The district court denied both motions. With respect to the issue of selective prosecution, it found that petitioner had established the first prong of the selective-prosecution standard — that he had been singled out for prosecution while other nonregistrants had not been prosecuted (Pet. App. 109a). However, it concluded that petitioner failed to demonstrate the second element of his claim — that he was impermissibly singled out for prosecution on the basis of activities protected by the First Amendment (Pet. App. 109a-110a; emphasis in original):

> Although the government's "passive" enforcement system may pick up names of some individuals who have exercised their First Amendment right to free speech by publicly speaking out against the draft registration law, there is no showing that the selection of these people for prosecution was *based upon* their exercise of the First Amendment right to free speech. [Petitioner] has not demonstrated that he is being prosecuted *because* he had expressed his opposition to the draft registration law. The undisputed evidence shows that [petitioner] is being prosecuted because he purposely identified himself to the Selective Service System as a non-registrant and has persisted in refusing to register by rejecting repeated opportunities to register that were offered him by the government.

After considering the statements made by Justice Department officials in the memoranda cited by petitioner, the court found that the government's policy was "to prosecute those willful non-registrants whose names are supplied to the Selective Service System by the non-registrants themselves or other members of the public and who persist in

---

of the government's case (Tr. 83). He also sought a jury instruction that, if he had a duty to register, it existed only during the period between July 21 and July 26, 1980; the requested instruction was not given (Tr. 135).

refusing to register after being given repeated government invitations to do so" (*id.* at 112a).

With respect to petitioner's claim that failure to register is not a continuing offense, the district court observed that Congress had amended the Act to overturn the decision in *Toussie* that nonregistration is not a continuing offense for purposes of the statute of limitations (Pet. App. 114a-115a). Based on the language and legislative history of that amendment (*id.* at 115a-123a), the court concluded that "Congress intended to and did make the offense of [failing] to register a continuing one" (*id.* at 123a).

3. The court of appeals, sitting en banc, affirmed (Pet. App. 1a-87a).[5] Applying the test of *United States* v. *Catlett*, 584 F.2d 864 (8th Cir. 1978), which petitioner did not contest (Pet. App. 8a, 29a), the court rejected the claim of selective prosecution. It agreed with the finding of the district court that petitioner "had failed to establish that his selection for prosecution was based on an impermissible ground" (*id.* at 9a-10a). As the court of appeals explained (*id.* at 12a):

> A disproportionate impact on dissenters, however, does not alone raise "a reasonable doubt" that it was a purpose of the government's prosecution policy to select for prosecution on the basis of the exercise of a constitutional right. It must be kept in mind that [petitioner's] letter included a clear admission that he had violated the law. This admission is not itself protected speech. Thus if [petitioner] was chosen for prosecution on the basis of his admission, and not because he expressed opposition to draft registration, the government's purpose in prosecuting him would not have

---

[5]The court of appeals, on its own motion, consolidated petitioner Eklund's appeal with that of petitioner Martin and set both cases for hearing en banc (Order of May 23, 1983).

> been different from that in any other case in which an admission of guilt provides the basis for prosecution.

The court of appeals concluded that "[t]he record shows that [petitioner] was prosecuted because he refused to register for the draft, apprised the authorities of his refusal, volunteered to be prosecuted, and declined gratuitously offered opportunities to escape prosecution by registering. * * * [Petitioner] has not shown that his prosecution flowed from a motive on the part of the government to prosecute him on the basis of the exercise of First Amendment rights. Indeed, First Amendment values were not threatened, implicated, or involved in his prosecution" (Pet. App. 29a-30a). In addition, based on this analysis, the court held that petitioner "has not made [the] showing necessary under *Catlett* which would entitle him to a hearing on his claim of selective prosecution" (*id.* at 30a).[6]

The court of appeals also agreed with the district court that failure to register is a continuing offense (Pet. App. 30a-62a). After analyzing at length this Court's decision in *Toussie* and the amendment enacted in 1971 in response to that decision, the court concluded that Congress intended the offense of nonregistration to be a continuing one that is not confined to the six-day period prescribed in the Presidential Proclamation.[7]

---

[6]In view of its decision that petitioner had failed to establish an impermissible basis for prosecution under the second part of the *Catlett* test, the court of appeals did not address the question whether petitioner had been singled out for prosecution in relation to others similarly situated under the first part of *Catlett* (Pet. App. 9a).

[7]The court also rejected arguments that Presidential Proclamation No. 4771 was improperly promulgated for failing to comply with the 30-day notice-and-comment requirement contained in 50 U.S.C. App. 463(b), and that Selective Service regulations implementing the Presidential Proclamation were improperly issued because they did not comport with the 60-day notice-and-comment provision adopted by the Director of Selective Service (Pet. App. 62a-67a).

Chief Judge Lay and Judges Heaney, McMillian, and Arnold dissented. They would have held that the Military Selective Service Act does not impose a continuing duty to register for the draft (Pet. App. 65a-77a) (opinion of Lay, C.J.), and that petitioner was entitled to a hearing on the issue of selective prosecution (*id.* at 77a-87a) (opinion of Heaney, J.).

ARGUMENT

1. Petitioner contends that he was impermissibly selected for prosecution for failing to register under the Military Selective Service Act and that, at the least, he was entitled to an evidentiary hearing on the issue of selective prosecution. The former issue is presented in *Wayte* v. *United States*, cert. granted, No. 83-1292 (May 29, 1984), and is also presented in the government's petition for certiorari in *United States* v. *Schmucker*, No. 83-2035. In view of our acquiescence in *Wayte* and our submission in *Schmucker* that consideration of that case be deferred pending the decision in *Wayte*, we submit that the instant petition should be held for *Wayte* and then disposed of as appropriate in light of that decision.[8]

With respect to the question of petitioner's right to an evidentiary hearing, that issue is also presented in our petition in *Schmucker*. We have asked the Court to hold our petition pending the outcome in *Wayte*. For the reasons stated in our petition in *Schmucker*, we submit that the

---

[8]Petitioner acknowledges that this question is identical to that presented in *Wayte* (Pet. i, 16, 18) and that (Pet. 19) the decision below "does not differ significantly in its reasoning from the Ninth Circuit opinion in *Wayte*, and there is no difference between the factual records in *Wayte* and [this case] material to any of these issues" raised by petitioner.

BEST AVAILABLE COPY

question of the right to a hearing presented in the instant petition should likewise be held for *Wayte*.[9]

Petitioner also argues that the applicable Selective Service regulations and Presidential Proclamation No. 4771 are invalid for failing to comply with certain notice-and-comment procedures. The Court denied review of these issues in *Wayte*,[10] and the same disposition is appropriate here.

2. Petitioner contends (Pet. 21-24) that his indictment improperly charged the failure to register as a continuing offense. In his view, the nonregistration offense ended at the expiration of the six-day period prescribed in Presidential Proclamation No. 4771. This issue of statutory construction was correctly resolved against petitioner by the court of appeals and does not present a conflict in the circuits. Accordingly, further review is not warranted.[11]

---

[9]Petitioner notes that the court of appeals in *Schmucker* "granted the defendant a hearing based on essentially the same prima facie showing as [petitioner's]" (Pet. 25).

[10]Petitioner concedes that these issues are the same as those in *Wayte*. See note 8, *supra*; see also petitioner's Motion to Expedite Consideration of Petition for a Writ of Certiorari at 3 n.*.

[11]There is no dispute in this case that a nonregistrant may be punished only once for failing to register regardless of whether that offense is a continuing one. Likewise, there is no dispute that a person who fails to register within the specified six-day period has committed an offense and is subject to prosecution at that time irrespective of whether the offense is continuing. As the court of appeals recognized (Pet. App. 31a, 59a), the practical significance of the "continuing offense" issue is on the questions of venue and willfulness in a nonregistration case. It may be quite difficult for the government to establish that the defendant was located in the district of prosecution during the designated six-day period and therefore to prove venue in that district. It also will be extremely difficult in most cases to show that the defendant's failure to register within that period was willful rather than the result, as can easily be asserted, of such things as ignorance, mistake, or inadvertence; see page 3, *supra*. If failing to register is a continuing offense, the venue

a. In arguing that the failure to register is not a continuing offense, petitioner relies on this Court's decision in *Toussie* v. *United States*, 397 U.S. 112 (1970). In *Toussie*, the Court held that the Selective Service Act, as then in existence, did not make nonregistration a continuing offense for purposes of the statute of limitations and therefore that the limitations period began to run at the end of the period provided for timely registration in the applicable Presidential Proclamation. As "guide[s] * * * [to its] decision" (397 U.S. at 114), the Court noted that "[t]he purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions" (*ibid.*) and that criminal limitations statutes are to be liberally interpreted in favor of repose (*id.* at 115). Observing that " '[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent' " (*ibid.*), and finding that the statute did not indicate a contrary result (*id.* at 120-121, 122-123), the Court concluded that nonregistration was not a continuing offense that would extend the statute of limitations. Hence, the limitations period expired five years after the end of the registration period immediately following the nonregistrant's 18th birthday.

However, as the court of appeals explained (Pet. App. 35a), petitioner's "reliance on *Toussie* does not take into account Congress's swift response to the decision." In 1971, the year following *Toussie*, Congress amended the Selective Service Act to provide (50 U.S.C. App. 462(d)):

---

requirement can be satisfied by bringing the prosecution in a district where the defendant resided during the period of nonregistration (including the district of residence at the time of indictment), and willfulness can be demonstrated if the defendant does not register after being personally informed of his obligation to do so.

> No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title [section 453 of this Appendix] unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur.

In amending the statute of limitations to reject the result in *Toussie*, Congress's use of the phrase "duty to register" plainly suggests that it conceived nonregistration to be a continuing offense.

Indeed, the entire rationale of the 1971 enactment is that the failure to register is a continuing offense. Congress provided that a person who did not register could be prosecuted until the age of 31 and was not insulated from criminal sanction at the age of 23, as *Toussie* had held. However, if a person "perform[ed] his duty to register" but did so late, he would be subject to prosecution only for the five-year period after the late registration and not for the entire period until his 31st birthday. Since a statute of limitations does not begin to run until the offense has ended (Pet. App. 42a; *Toussie*, 397 U.S. at 115), it is clear that Congress intended the nonregistration offense to continue past the initial six-day period for registration. Moreover, this is the only interpretation that treats the "late registration" provision in the 1971 amendment in a logical and coherent fashion; as the court below observed (Pet. App. 40a-41a):

> If the duty to register does not continue after the original registration period, * * * it would be impossible for a man to perform that duty tardily and thus gain the benefit of the shortened limitations period provided by section 462(d). Unless the duty is a continuing

> one, its performance could only be accomplished at a time before any violation of the law had been committed. * * * [T]o interpret the statute otherwise would render part of it ineffective.

The legislative history of the 1971 statute confirms that Congress made nonregistration a continuing offense. Section 462(d) was proposed by the Selective Service shortly after *Toussie* (see Pet. App. 43a). In his testimony before Congress, the Director of Selective Service explained that the legislation was designed to make clear that registration is a continuing requirement. See *Extension of the Draft and Bills Related to the Voluntary Force Concept and Authorization of Strength Levels: Hearings Before the House Comm. on Armed Services*, 92d Cong., 1st Sess. 60, 165 (1971); *Selective Service and Military Compensation: Hearings Before the Senate Comm. on Armed Services*, 92d Cong., 1st Sess. 74 (1971); Pet. App. 44a-45a. As the Assistant Chief Counsel for the House Armed Services Committee summarized, "[t]he question [is] whether the failure to register is a continuing violation or [a] single violation. This is the essence of the problem" (*House Hearings* 165).

The same understanding was also expressed by Congress itself. For example, the Report of the House Committee on Armed Services stated that the amendment would "emphasize the continuing requirement of registration." H.R. Rep. 92-82, 92d Cong., 1st Sess. 17 (1971); see Pet. App. 49a-50a. Senator Byrd, a member of the Senate Armed Services Committee, also discussed the continuing nature of the duty to register; in opposing an amendment introduced by Senator Gravel to delete Section 462(d) as "mak[ing] failure to register * * * a continuing offense" (117 Cong. Rec. 18444 (1971) (remarks of Sen. Gravel)), Senator Byrd explained that the

committee bill, in effect, declares that an individual has a continuing responsibility to register with the Selective Service until the age of 26. Consequently, if at the age of 26 a young man has failed to fulfill his responsibility to register, the 5-year statute of limitations will begin to run and the registrant would be liable for prosecution until the age of 31.

* * * * *

The Supreme Court in *Toussie* v. *United States*, 397 U.S. 112 (1970) interpreted congressional intent as being that failure to register is a single act. * * *

[The Gravel amendment] would uphold the Court's reading of congressional intent * * *.

The committee bill, in effect, declares that an individual has a continuing responsibility to register.

Id. at 18445-18446; see Pet. App. 52a-53a. Similarly, Senator Stennis, Chairman of the Senate Armed Services Committee, explained that nonregistration would, in light of Section 462(d), be "what we call in law a continuing offense. [A violator] continues to be liable to register, but the statute of limitations barring prosecution will not begin to run until his 26th birthday. It runs 5 years further. * * * * * [The] principle of a continuing crime is basic law." 117 Cong. Rec. 18769-18771 (1971); see Pet. App. 53a-54a. And Senator Thurmond, another member of the Armed Services Committee, noted that Section 462(d), "in effect, declares that an individual has a continuing responsibility to register with selective service until age 26." 117 Cong. Rec. 18770 (1971); see Pet. App. 55a.[12]

---

[12]Section 462(d) was also intended to achieve fairness and equity between those who failed to register upon their 18th birthday and those who timely fulfilled their registration obligation. See H.R. Rep. 92-82, *supra*, at 17; S. Rep. 92-93, 92d Cong., 1st Sess. 72 (1971); 117 Cong.

b. Petitioner raises several objections to the court of appeals' holding that failure to register is a continuing offense. First, he asserts (Pet. 23-24) that there is no continuing duty to register because a Selective Service regulation providing for such an obligation, which was in effect at the time of the decision in *Toussie*, was rescinded following enactment of Section 462(d). See 32 C.F.R. 1611.7(c) (1971), repealed by 37 Fed. Reg. 17963 (1972). The court of appeals correctly rejected this argument (Pet. App. 45a-47a). As this Court held in *Toussie* (397 U.S. at 120-121), the continuing-offense issue is a question of legislative intent. For the reasons discussed above, the text and history of Section 462(d) establish that Congress intended the offense of failing to register to be a continuing one. That intent is not defeated by the elimination of a pre-existing administrative regulation that the Selective Service — which was charged with implementation of the Act and in fact had proposed the 1971 amendment — presumably felt was no longer necessary in light of Section 462(d). Petitioner has offered no reason to believe that Congress intended the purposes behind the continuing-registration policy of Section 462(d) to be dependent on the existence or terms of an agency regulation (cf. *United States* v. *O'Brien*, 391 U.S. 367, 380 (1968)), and he has cited nothing to support his contention (Pet. 23 n.2) that Section 462(d) "simply ratifies the kind of regulation the Selective Service had in force at the time of *Toussie*."

Rec. 18445-18446 (1971) (remarks of Senator Byrd); Pet. App. 48a-49a. In addition, registration is designed to assemble the names and addresses of potential military personnel in order "to facilitate any eventual conscription." *Rostker* v. *Goldberg*, 453 U.S. 57, 59 (1981). By imposing a continuing duty to register and authorizing late registration, Congress sought to subject a late registrant to the same burdens of military service as the timely registrant and to provide the Selective Service with a larger list of possible inductees.

Petitioner also argues (Pet. 24) that the court of appeals' construction renders the statute void for vagueness because it does not give adequate notice of the offense. This claim is insubstantial. As discussed above, the language and history of Section 462(d) fairly apprise a prospective registrant of the duties and consequences imposed by the Act. Thus, the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Furthermore, because a nonregistrant must "knowingly" fail to perform his duty to register in order to violate the Act (50 U.S.C. App. 462(d)), a conviction for the continuing offense of non-registration requires that the defendant have knowledge of his legal obligation. As this Court has recognized, "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the [defendant] that his conduct is proscribed." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (footnote omitted). Accordingly, the statute does not pose a "trap [for] the innocent by not providing fair warning." *Grayned* v. *City of Rockford*, 408 U.S. at 108 (footnote omitted). Contrary to petitioner's suggestion, "[t]he fact that Congress might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague." *United States* v. *Powell*, 423 U.S. 87, 94 (1975), quoting *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947).

Finally, petitioner refers in passing (Pet. 24 n.3) to a possible self-incrimination issue if the statute is construed to establish a continuing offense.[13] Even assuming that the issue is not premature before petitioner seeks to register

---

[13] This issue was raised in the court of appeals only by Martin and not by petitioner (see Pet. App. 95a).

(but see *Selective Service System* v. *Minnesota Public Service Research Group*, No. 83-276 (July 5, 1984), slip op. 15-16), no substantial Fifth Amendment question is presented in this case. First, in no case has a late registrant been prosecuted for his previous failure to register. Thus, as a practical matter, any information provided by petitioner in a late registration would not have incriminated him by forming the basis for a criminal prosecution. Cf. *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478-481 (1972). Furthermore, because petitioner had committed an offense by failing to register within the six-day period specified in the Presidential Proclamation, and because the continuing nature of the offense does not subject him to any additional sanction (see note 11, *supra*), the continuing duty to register does not constitute compulsion. See *United States* v. *Toussie*, 410 F.2d 1156, 1159-1160 (2d Cir. 1969), rev'd on other grounds, 397 U.S. 112 (1970); Pet. App. 95a. As Justice White concluded in his dissent in *Toussie* (397 U.S. at 133 (citation and footnote omitted; emphasis in original)):

> [I]f this is a continuing offense, petitioner — as the Government concedes — is subject to only one prosecution based on his single uninterrupted course of conduct. Petitioner was subject to that prosecution six days after his 18th birthday; his continued failure to register did not subject him to any additional penalty beyond what he had already risked. Thus, though it may be conceded that late registration would have been incriminating, the statute here * * * does not *compel* incrimination. Petitioner had nothing to gain in the form of avoiding an additional penalty by registering and revealing that his registration was late. The only possible "incentive" in this case stems from the fact that by registering, petitioner would have caused the statute of limitations to commence running, thus

giving the Government only five years in which to prosecute instead of leaving prosecution open until age 31. To suggest that this possibility of starting the statute running is sufficiently "attractive" to amount to "compulsion" for purposes of the Fifth Amendment is purest fancy.

CONCLUSION

With respect to the second and third questions presented, the petition for a writ of certiorari should be held pending the decision in *Wayte* v. *United States* and then disposed of in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOHN F. DEPUE
Attorney

AUGUST 1984

DOJ-1984-08